

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Consolidated Application of)	
)	
General Motors Corporation,)	
Hughes Electronic Corporation, and)	MB Docket No. 03-124
The News Corporation)	
)	
For Consent to Transfer Control)	
)	
To: The Commission)	

REPLY COMMENTS



I. Introduction

For smaller market cable operators, the proposed transaction means this: News Corp., the conglomerate that each company must deal with for key broadcast and satellite programming, now aims to control their biggest competitor. For ACA members, the consequences of being squeezed between a News Corp.-controlled DirecTV and a News Corp.-controlled Fox broadcast and programming empire are painfully obvious.

As discussed in ACA's Comments, News Corp. will have strong incentives and ample ability to raise costs for consumers and eliminate competition in many smaller markets. News Corp.'s weapons will include: (i) retransmission consent for Fox O&O stations; (ii) prices and terms for Fox satellite programming; and (iii) exclusive DirecTV programming. Backed by News Corp./DirecTV's inexorable advantages in resources, economic power and market power, this transaction presents a clear and present danger to competition and consumers in smaller markets.

The record contains solid support for the public interest harms identified by ACA.

Nearly all commenters recognize the powerful incentives and ability of a combined News Corp./DirecTV to disadvantage competitors and raise costs to consumers. Concerning the threats to competition and consumers in smaller markets, the analysis of former FCC Chief Economist Professor William P. Rogerson is especially germane.¹

These Reply Comments summarize the substantial support in the record for the concerns raised in ACA's Comments. We also discuss one other anticompetitive concern reflected in the record – News Corp.'s control of Gemstar's EPG.

ACA has asked the Commission to require the Applicants to give straight answers to several questions concerning retransmission consent and programming in smaller markets. If the Applicants refuse to make meaningful commitments in these areas, the Commission can readily conclude that the public interest harms in smaller markets far outweigh any claimed benefits of the proposed combination.

II. The record contains solid support for the public interest harms described by ACA.

ACA's Comments describe how the Applicants will have strong incentives and powerful means to weaken and eliminate smaller competitors.² To achieve the goals of increased programming revenues and increased DirecTV subscriber growth, News Corp. will wield three principal weapons: (i) retransmission consent for Fox O&O stations; (ii) prices and terms for Fox Cable Networks programming; and (iii) exclusive broadcast and satellite programming arrangements through DirecTV. Each threatens

¹ William P. Rogerson, An Economic Analysis of Competitive Effects of the Takeover of DirecTV by News Corp., ("Rogerson Analysis"), Comments of Advance/Newhouse Communications, Cable One, Cox Communications, and Insight Communications, MB Docket No. 03-124 (filed June 16, 2003) ("Joint Commenters") at Exhibit A.

² Comments of the American Cable Associations, MB Docket No. 03-124 (filed June 16, 2003) ("ACA Comments") at 8-10 (retransmission consent), 6-18 (access to satellite programming), and 21-22 (exclusive programming).

smaller cable systems' ability to compete. Pitted against News Corp.'s overwhelming advantages in resources, economic clout and bargaining power, smaller market cable systems are especially vulnerable.

We discuss below how the current record corroborates the public interest harms identified by ACA. This record underscores the need for the Commission to scrutinize the transaction with extra care and skepticism.

A. The record shows that smaller market cable operators and consumers are especially vulnerable to News Corp.'s manipulation of retransmission consent.

As described in ACA's Comments, News Corp. will have strong incentives and ample ability to use control over retransmission consent rights to harm smaller competitors and to benefit DirecTV and News Corp.³ Merger-specific retransmission consent problems include: (i) imposing onerous and costly terms of retransmission consent on smaller cable operators; and (ii) exclusive retransmission consent arrangements with DirecTV targeted at smaller cable systems. Because of the immense disparity in leverage and economic power, smaller market cable operators are extremely vulnerable to this conduct.

On this point, the record is unequivocal. MVPD commenters uniformly describe the same threat.⁴

³ ACA Comments at 8-10.

⁴ Joint Commenters at 30 (describing News Corp.'s new "threat point" in retransmission consent negotiations – pulling the broadcast signal from the cable operator while DirecTV markets aggressively to that operator's subscribers); Comments of Cablevision Systems Corp., MB Docket No. 03-124 (filed June 16, 2003) ("Cablevision Comments") at 14-15 (refusal to give in to Fox's retransmission consent demands "would drive MVPD subscribers straight in DirecTV's waiting arms"); Petition to Deny and Comments of EchoStar Satellite Corp., MB Docket No. 03-124, (filed June 16, 2003) ("EchoStar Petition") at 13 (describing how the deal enables News Corp. to use retransmission consent "to undermine seriously the competitive ability of competing distributors"); Petition of the National Rural Telecommunications

As we analyze this data, one point is remarkable - the size of the MVPDs fearing News Corp.'s manipulation of retransmission consent. These include EchoStar (about 8.5 million subscribers), Cox Communications (about 6.3 million subscribers), and Cablevision Systems (about 3.0 million subscribers). Some of these companies hold interests in satellite programming (including arrangements with News Corp. affiliates), and other media assets. By any definition, these companies are not small businesses.

This leads to a fundamental question about this transaction: If firms like Cox, Cablevision and EchoStar fear the anticompetitive consequences of News Corp.'s use of retransmission consent, what about the average ACA member serving 8,000 subscribers? Or the more than 500 ACA members that serve under 1,000 subscribers? How are these companies expected to fare in retransmission consent negotiations with News Corp.'s Fox while they are competing against News Corp.'s DirecTV? It is self-evident that ACA members and the smaller markets they serve are far more vulnerable.

Former FCC Chief Economist Professor William Rogerson reaches the same conclusion. Prof. Rogerson states that Fox Network programming is "must-have" programming,⁵ and News Corp will have the incentive and ability to harm DirecTV's competitors through retransmission consent.⁶ Most important for our analysis, Prof. Rogerson concludes that the threat to competition and consumers "will be particularly serious in less dense regions of the country served by small and medium sized cable

Cooperative to Designate Application for Hearing, MB Docket No. 03-124 (filed June 16, 2003) ("NRTC Petition") at 13 (describing how News Corp. will leverage retransmission consent to reduce or eliminate competition in smaller markets); *see also* Petition to Deny of the Center for Digital Democracy, MB Docket No. 03-124 (filed June 16, 2003) ("CDD Petition") at 5 (calling for investigation of News Corp.'s retransmission consent practices).

⁵ Rogerson Analysis at 9 and 11.

⁶ *Id.* at 6.

systems. . . as DirecTV's rivals will be driven out of the business or fundamentally weakened. . . ."⁷

Retransmission consent will be one of News Corp.'s principal weapons to dominate smaller markets. The Applicants have yet to make any commitment in this regard. To protect competition and consumers in smaller markets, the Commission should require straight answers to question raised by ACA:

Will the Applicants commit to specific enforceable safeguards to ensure that News Corp.-controlled broadcast stations do not use retransmission consent to disadvantage smaller market cable companies to benefit DIRECTV?

If no, why not?

If yes, what specific commitments will the Applicants make and how can these be enforced to protect small competitors with limited resources?

Without satisfactory answers to these questions, the Commission can readily conclude that the public interest harms weigh heavily against the transaction.

B. The record shows that smaller market cable operators and consumers are especially vulnerable to News Corp.'s manipulation of program access.

As described in ACA's Comments, News Corp. will have strong incentives and ample ability to use control over Fox satellite programming to harm smaller competitors to benefit DirecTV and News Corp.⁸ Merger-specific program access problems include: (i) imposing more costly terms and conditions of program access on smaller cable operators and using "volume" discounts to justify favorable pricing for DirecTV; and (ii) entering into exclusive programming arrangements targeted at DirecTV's smaller cable system competitors. Because of the immense disparity in size and economic power,

⁷ *Id.* at 4.

⁸ ACA Comments at 16-18.

smaller market cable operators are far more exposed to this conduct. The record is unanimous on this point. All MVPD commenters (including the Applicants) identify the same threat.⁹ As reflected throughout the record, News Corp.'s control over regional sports programming intensifies the problem.¹⁰

The question again becomes: If top MVPDs like Cablevision, Cox, and EchoStar foresee harm from News Corp.'s anticompetitive manipulation of program access, what about ACA members? These smaller businesses will be the easiest targets in News Corp.'s drive for programming revenues and millions more DirecTV subscribers.

Again, Prof. Rogerson agrees. He writes:

It is also important to note that both of these effects [increasing Fox programming prices and withholding "must have" programming] will be particularly serious in less dense regions of the country served by small to medium sized cable operators. This is because raising the price of programming or withdrawing programming from these firms is more likely to drive them entirely out of the market. This will increase both News Corp.'s incentive to raise prices and withdraw programming and the bargaining power it can wield by threatening to withdraw programming. Therefore the merger is most likely to cause significant price rises in less dense regions of the county served by small to medium sized cable operators.¹¹

Professor Rogerson also confirms that the Applicants' proposed program access undertakings offer smaller cable systems no protection. He states, "since the proposed

⁹ Joint Commenters at 43 (describing News Corp.'s ability to raise programming prices and withhold programming, placing cable operators at a competitive disadvantage against DirecTV); Cablevision Comments at 28-29 (describing News Corp.'s ability and incentive to increase programming prices and withhold programming); EchoStar Petition at 22 (describing News Corp.'s ability to demand higher fees or withhold programming to benefit DirecTV); NRTC Petition at 9-10 (describing the potential for vertical foreclosure and the resultant harms in rural markets); and RCN Comments at 8-9.

¹⁰ ACA Comments at 18; Rogerson Analysis at 12-16; Joint Commenters at 36; EchoStar Petition at 22-24; NRTC Petition at 13-4, RCN Comments at 3.

¹¹ Rogerson Analysis at 4.

conditions expressly allow quantity discounts, it places very little constraint on the prices that News Corp. could charge smaller cable systems.”¹² We concur, as do the other MVPD commenters.¹³

Control over prices and terms of access to “must have” programming will enable News Corp. to weaken smaller market competitors to the benefit of News Corp. and DirecTV. To protect competition and consumers in smaller markets, the Commission should require straight answers to the questions raised by ACA:

Will the Applicants commit to specific enforceable safeguards to ensure that News Corp.-controlled satellite programmers do not use programming prices, terms and conditions to disadvantage smaller market cable companies to benefit DIRECTV?

If no, why not?

If yes, what specific commitments will the Applicants make and how can these be enforced to protect small competitors with limited resources?

Without satisfactory answers to these questions, the Commission can readily conclude that the public interest harms in smaller markets weigh against the transaction.

C. The record validates the public interest harms that will result from News Corp.’s bottleneck control over DirecTV programming in smaller markets.

As described in ACA’s comments, News Corp. will have strong incentives to expand DirecTV’s practice of program exclusivity, both in the delivery of local-into-local signals and satellite programming like *NFL Sunday Ticket*.¹⁴ After DirecTV gains all the claimed advantages of News Corp. ownership, the refusal to distribute this

¹² Rogerson Analysis at 5.

¹³ ACA Comments at 19; Joint Commenters at 55-59; Cablevision Comments at 29; NRTC Petition at 21; EchoStar Petition at 58-62.

¹⁴ ACA Comments at 21-23.

programming to smaller market cable operators only enhances News Corp./DirecTV's ability to weaken and eliminate competition.

The record reflects DirecTV's emphasis on exclusive programming as a competitive weapon, and News Corp.'s incentive to leverage this exclusive programming.¹⁵ The question becomes: Will it serve the public interest to permit News Corp./DirecTV to continue to deny smaller cable competitors access to exclusive satellite and broadcast programming? The Commission can readily conclude: No.¹⁶ If this transaction is to close, the public interest in competition and program diversity in smaller markets warrants obligating News Corp. to provide nondiscriminatory access for smaller cable operators to all DirecTV-controlled programming.

D. The record reflects the ability of News Corp. to use control over Gemstar's EPG to disadvantage smaller market cable operators.

In reviewing the current record, ACA identifies one additional issue compounding the problems discussed above - News Corp.'s control of Gemstar's Electronic Programming Guide. As reported elsewhere to the Commission, ACA members are steadily rolling out digital cable service in smaller markets.¹⁷ An EPG is an essential

¹⁵ Comments of the National Association of Broadcasters, MB Docket No. 03-124 (filed June 16, 2003) at 20 (describing News Corp.'s incentive and ability to exercise "gatekeeper" control over programming); Joint Commenters at 40-41 (describing DirecTV's ability to "supercharge" News Corp.'s "battering ram" of sports programming through exclusivity).

¹⁶ *Implementation of the Cable Television Consumer Protection And Competition Act, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, ¶ 34 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this "must have" programming, their ability to retain subscribers would be jeopardized."). This conclusion applies with even more force to small cable operators' ability to compete with News Corp./DirecTV.

¹⁷ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Comments of the

feature of digital services, and Gemstar is the dominant EPG provider. As reported by the Center for Digital Democracy, Fox programming already enjoys preferential treatment in Gemstar's EPG.¹⁸

Many ACA member systems currently use Gemstar's EPG. Unlike some major MVPDs, ACA members do not have the resources to develop EPGs in competition with Gemstar. As with News Corp.-controlled broadcast and satellite programming, upon gaining control of DirecTV, News Corp. will have the incentive and ability to increase EPG costs and threaten to withhold access to disadvantage smaller competitors of DirecTV. Consequently, the Commission's investigation should also scrutinize and constrain News Corp's ability to leverage Gemstar's EPG as a competitive weapon against smaller distributors.

III. The record shows that the claimed public interest benefits of the transaction fail to outweigh the harms in smaller markets.

ACA's Comments describe how the Applicants' claimed public interest benefits are either vague, speculative, not merger specific, or benefit the parties' private interests, not the public.¹⁹ The record affirms these points.²⁰ In light of the serious public interest harms that will result in smaller markets, the Applicants have so far failed to make a sufficient showing to warrant Commission consent under Section 310(d).

American Cable Association (filed March 28, 2000) at 6-7 (reporting that up to 90% of ACA member systems have launched, or will launch in the near term, digital cable services, principally through Comcast-controlled HITS service.)

¹⁸ CDD Petition at 4.

¹⁹ ACA Comments at 24-28.

²⁰ Joint Commenters at 86 (News Corp.'s "promise" to dramatically increase local-into-local does not withstand scrutiny); NRTC Petition at 17 (difficult to evaluate local-into-local "promise"); EchoStar Petition at 42-43 (claim to increase HDTV distribution not merger specific, DirecTV has already announced expanded HD service).

IV. Conclusion

The current record shows that in the smaller markets served by ACA members, the combination of News Corp. and DirecTV presents a clear and present danger to the public interest. News Corp. has strong incentives and ample ability to use retransmission consent and access to programming as competitive weapons against small competitors to DirecTV. This conduct will harm the public interest in competition, program diversity, broadband deployment and the viability of many local communications businesses. The public interest benefits claimed by the Applicants and the proposed program access commitments offer no protection.

The Commission must get straight answers to the question posed by ACA. Absent verifiable and enforceable commitments or conditions to prevent public interest harms in smaller markets, the proposed News Corp./DirecTV transaction cannot meet the requirements for approval under the Commission's Section 310(d) review.

Respectfully submitted,

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Certificate of Service

I, Amy Bowin, paralegal with the law firm of Cinnamon Mueller, certify that a true and correct copy of the American Cable Association's Comments was served on the following individuals by either first class mail or electronically on July 1, 2003.

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